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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 171.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY AND E. P. HILL AND W. H. SHAW, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS,

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Supplemental Brief of Defendant in Error, by M. M. Crane, Counsel for the State of Texas.

(No. 16,634.)

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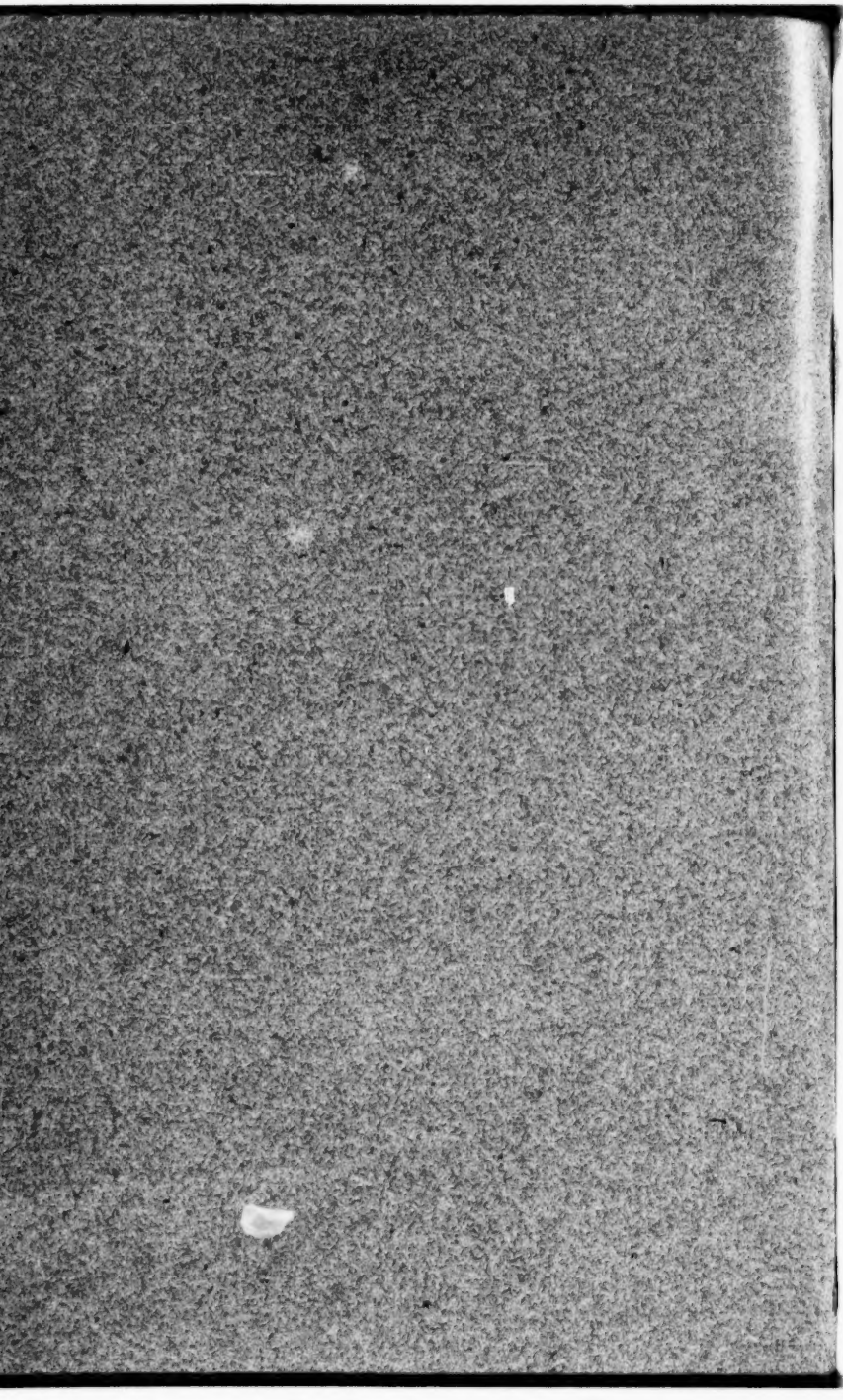

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(No. 16,634.)

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IN ERROR TO THE COURT OF CIVIL APPEALS OF THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Supplemental Brief of Defendant in Error, by M. M. Crane, Counsel for the State of Texas.

An examination of the various acts of the legislature contained in the brief of the plaintiff in error will disclose the following:

1st. That the Buffalo Bayou, Brazos and Colorado Railway Company was chartered by special act of the Texas

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legislature February 11, 1850. (General Laws, 3d Legislature of Texas, pp. 194 to 198; Appendix to Brief of Plaintiff in Error, pp. I to VII, inclusive.)

2d. That no land grant was embodied in the charter.

3d. That eight sections of land per mile were granted to said road by amendment of its charter, approved January 29, 1853, and that this amount secured by the charter was abandoned in lieu of the large amount granted by the general act of 1854. (See Special Laws passed at extra session of 4th Texas legislature, pages 3 to 5; Appendix to Brief of Plaintiff in Error, pages IX to XII.)

4th. That a general law was passed on the 30th of January, 1854, granting sixteen sections of land per mile to all railroads within the State thereafter constructing roads. (Gen'l Laws, 5th Tex. Legislature, pp. 11 to 15; Appendix to Brief of Plaintiff in Error, pp. XI to XVIII.)

5th. That the Buffalo Bayou, Brazos and Colorado Railway Company was by a special act of the legislature of Texas approved February 4, 1854, permitted to accept the provisions of the general act of January 30, 1854. (Special Laws, 5th Tex. Legislature, p. 69; Appendix to Brief of Plaintiff in Error, p. XIX.)

6th. On the same date, to wit, February 4, 1854, another supplementary act was passed by the Texas legislature providing in substance that if the Buffalo Bayou, Brazos and Colorado Railway Company shall avail themselves of the last above named act and accept any donations of land from the State, then the said company shall restrict themselves

to the following route: To an extension of their existing road to Austin, in the county of Travis, crossing the Brazos river at any point between the town of Richmond, in Fort Bend county, and Hidalgo Falls, in Washington county, and with the right of extending their road from Austin to connect with any road running north of Austin toward the Pacific ocean, but with no authority to build any branch line. (Special Laws, 5th Tex. Legislature, p. 70; Appendix to Brief of Plaintiff in Error, pp. XIX, XX.)

7th. That the act of 1854 was extended by the act of November 13, 1866, for a period of ten years. (Gen'l Laws, 11th Tex. Legislature, p. 212.)

8th. That the Buffalo Bayou, Brazos and Colorado Railway Company had been sold out under an execution and deed of trust and their property purchased by others, and that these purchasers had formed a *new* company, which was called by the old name. (Appendix to Brief of Plaintiff in Error, pp. XXV to XXX.)

From the foregoing it is plain that the Buffalo Bayou, Brazos and Colorado Railway Company, or the old "sold-out" corporation, relied upon the general act of 1854 for the lands claimed therein, and the record discloses this fact. (See Record, p. 40.)

The question raised, therefore, in Davis *vs.* Gray is not involved in this case. In that case the railroad company had, by the stipulations of its charter which it had accepted from the State, contracted for the right to build its road and secure a grant of land for each mile thereof; in this case the old corporation relied upon the general laws which the State had a right to repeal at any time. This is more ap-

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parent when we remember that none of these acts granting lands to the railroad companies exacted anything more from them than the performance of the duties which would be incumbent upon a railroad company without a land grant. The grant was, therefore, a gratuity. (Salt Company *vs.* East Saginaw, 13th Wallace, 373, 376.)

9th. The act of 1870, which really incorporated the plaintiff in error company, did not issue any additional land grants. (See section 12 of that act.) This language is used in that section:

"*Provided* that nothing in this act contained shall be construed as reviving or renewing any land grants to said company for road *hereafter* to be completed which it does not possess by existing law."

ARGUMENT.

I will not repeat what has already been heretofore said in brief and at bar to the effect that the land grant was limited by the express terms of these acts to the road to be built to Austin by the old company and *not in the direction of San Antonio.* That was the contract between the State and the defendant. If it be regarded as completely assigned to the new corporation, it could not carry with it the right to land granted for the completed road westward to San Antonio. The contract assigned to the new corporation could not have extended beyond its original terms. It could not do more than authorize the new company to fulfill the old contract—that is, to build the road to Austin and get the land therefor.

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Had the new corporation constructed the old line of railroad to Austin for which the State had promised a land grant, this question would then fairly be raised, but inasmuch as it did not construct that line of road, but an entirely different one, it is too plain for argument that the land grant does not follow the new line of road. It cannot be extended by implication. The State made no contract with the new corporation, because the new corporation did not exist until the power of the State to grant lands to railroads was taken away. So far as the new corporation is concerned, it is fairly within the rule laid down in Pearsall *vs.* Great Northern Railway Co., 161 U. S., 659, 666, and cases therein cited.

The grant, to be effective, must be expressed in clear and unambiguous language. (Fertilizer Company *vs.* ——, 97th U. S., 659, 666.)

Every reasonable doubt is solved against the corporation; "Silence is negation and doubt is fatal to the claim." Such is the language of this court in the case last cited.

It is plain, therefore, that the constitution of 1869 rendered it impossible for the State, through any of its departments, to make any grants of land, and it is equally plain that, inasmuch as the right of the old company to the land rested upon the general statute, its repeal by the adoption of the constitution did not impair the obligations of the contract within the meaning of the Constitution of the United States as interpreted by this court.

But it is insisted that because the plaintiff in error earned lands under the act of 1876, that therefore they ought to be able to retain these specific lands in this litigation to satisfy the claim made under a different statute. In other words, they are in the situation of a defendant or respondent in a

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court of equity asking to have another and a different contract specifically enforced. It is necessary, therefore, to understand what the contract is upon which this claim is based. The act of 1876 provides in substance that the legislature of the State of Texas shall give to every railroad of Texas sixteen sections of land per mile for all road which should be thereafter completed. The land would be obtained as follows:

First. Upon the completion of certain sections of the road therein designated an engineer should be appointed to inspect same, and if he reports favorably the Commissioner of the General Land Office shall issue to the company sixteen certificates of 640 acres of land each for every mile of road so completed. Then it was the duty of the company to apply to the district surveyor of any land district in the State to survey such lands out of any unappropriated land in the district of said surveyor. Said survey should be made in alternate sections or half sections, as nearly square as practicable, one section for the company, etc. The field-notes of this survey, together with the maps, should be returned to the land office by the railroad company, whereupon patents shall be issued for the odd sections of the said surveys.

The contract under the act of 1876, provided that all of its terms were complied with by the railroad company, required two things to be done by said railroad company: First, the completion of the road; then after an inspection by the engineer to have the land surveyed, mapped, and the field-notes returned to the land office, after which it became the duty of the State to issue patent, not before; out in no event could patents be issued to lands that were

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not surveyed and mapped under the provisions of this act. It is plain, therefore, that if this court undertakes to enforce the specific performance of any contract, it must enforce the contract which the parties themselves made; and, inasmuch as Texas had never agreed to give the plaintiff in error the lands involved in this case for the construction of the road under the act of 1876, this court cannot decree that these lands must be given unless language be read into the contract which was not in contemplation by either party at the time the contract was made. It would be the enforcement of a contract different from any that was made or from any that could be made by virtue of the authority of the statutes of Texas.

This court has twice decided that no title can be obtained from the State of Texas to any of her lands unless the terms of the statute under which title is sought should be fully complied with, and if the statute requires surveys to be made and field-notes to be returned to the land office before title can be obtained, that rule must be complied with or the State will recover the lands, no matter if money has been paid into the State for the lands thus sought to be purchased. (Bacon *vs.* Texas; Telfner *vs.* Russ. 16 U.S.)

Bacon and Graves had tried to get Texas lands for the Houston and Texas Central Railway Company. The railroad company, represented by Olcott in this court, paid money into the State treasurer and adopted the field-notes of the previous surveys made by the Houston and Texas Central Railway Company; they had paid for the land and could not get it because they had not complied with the terms of the act.

How much better off was the plaintiff in this case by con-

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structing the road from San Antonio west than it would have been had it purchased the land and paid money to the State under the act requiring survey to be made and field-notes returned before title could be acquired? Does the building of the road imply a more sacred obligation on the part of the State of Texas to give these lands to the railroad company than could be created by the payment of cash into the treasury of the State? To ask the question is to answer it. If a survey is necessary where money is paid, how much more should it be necessary where the grant of lands is a pure donation on the part of the State.

The utmost that this court could do under circumstances most favorable to the plaintiff in error would be to decree a specific performance of the contract under the act of 1876. That would require on the part of the State an inspection of the roads by the State officers and the issuance of land certificates. But no such relief was asked in the court below nor in this court. Hence it cannot be given. Their answer does not ask it. It is not necessary therefore to discuss that further; but surely the court cannot give to plaintiff in error land under a contract which does not authorize this court to give it any particular lands, but only land certificates, which it may or may not locate elsewhere.

I respectfully submit that, unless the rule be abrogated which authorizes each State to make its own regulations for the conveyance of real estate, the relief asked for by plaintiff in error cannot be granted.

M. M. CRANE,
Counsel for the State of Texas.

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